No. 15,201

United States Court of Appeals

For the Ninth Circuit

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and PEARL K. LANNIN,

Appellants,

vs.

TWIN CITY COMPANY, TWIN CITY LUMBER CO., JOHN W. HUNTER, FRANKLIN SUPPLY CORPORATION, SOUTHWEST MANAGEMENT CORP., H. A. COLLINS, and WILLIAM R. RAMSAY,

Appellees.

BRIEF OF APPELLEES.

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LEGAL PROCEEDINGS TO DATE.

Appellees have no quarrel with the recitation in Appellants' Opening Brief on the above subject as far as it goes. It should be noted, however, that after the dismissal by the Referee in Bankruptcy of the summary proceedings instituted by the Trustee against Appellant Pearl K. Lannin, who attempted therein to join Appellee Twin City Lumber Co. as Respondent, neither Appellee Twin City Lumber Co. nor any other

of Appellees took any part in that summary proceeding and are, therefore, not bound in any respect by the Referee's determination that the "Trust Agreement" (which will be hereafter referred to as part of the so-called "October transaction") was void as against the Trustee.

Appellees have satisfied in full the judgment rendered by the trial court in favor of the Trustee on Count 3 of his complaint, and the judgment against the Trustee and in favor of Appellees on Count 2 has become final.

STATEMENT OF FACTS.

In 1953 the bankrupt was engaged in the retail lumber business in San Jose, California, and purchased a large part of his stock in trade from Appellee Twin City Lumber Co., a Los Angeles wholesaler. We agree that, for the purposes of this appeal, as well as at the trial, all of Appellees are to be considered in the same category as Appellee Twin City Lumber Co. and will hereafter be referred to by us as "Appellees." In May, 1953, by reason of the previous unsatisfactory payment record of the bankrupt, the so-called "May agreement" referred to in paragraph VII of plaintiff's complaint (T.R. p. 9; Pl. Ex. No. 1) was entered into between the bankrupt and Appellees whereby a so-called field warehouse was set up in the bankrupt's premises and wherein was deposited lumber sold by Appellees to the bankrupt and for which Douglass Guardian Warehouse Co. (Pl. Ex. No. 2, T.R. p. 92),

the operator of said warehouse, issued warehouse receipts in the name of and delivered same to Appellees, as security for the bankrupt's existing and continuing obligations to Appellees. An examination of this May transaction will indicate clearly that, except for defaults in payments by the bankrupt to Appellees, Appellees gained no "power to prevent the bankrupt from continuing in business" and then only had the right to "close the warehouse" to the extent of cancelling or withdrawing the rights by which, under the terms of the May transaction, the bankrupt was permitted to withdraw lumber from the field warehouse to a limited extent without payment for such withdrawals to be applied on his account with Appellees.

Between May and October, 1953, despite this liberal, workable and businesslike arrangement between the bankrupt and Appellees, the bankrupt's indebtedness to Appellees increased, his payments were not only delinquent but irregular and, in several instances, were made by checks which were not honored by his bank. Appellees then, properly, and in the exercise of their rights under the pledge arrangement of the warehouse receipts and the so-called "May agreement," instructed the warehouse company to permit no further withdrawals of lumber therefrom by the bankrupt without payment in full therefor, and advised the bankrupt that, unless some new and/or more satisfactory arrangement for security were made with them by the bankrupt they would cancel the May agreement and would, if necessary, foreclose their pledge of the lumber through the warehouse receipts.

As a result, and in order to be able to continue his retail lumber business, the bankrupt (*not Appellees*) initiated what has been referred to as the "October transaction" (Para. XI of Pl.'s Complaint, T.R. pp. 13-14). It is this "October transaction" which Appellants seek to have set aside as fraudulent and which was the subject matter of Counts 1 and 4 of the Complaint and of the Cross-Complaint (T.R. pp. 34-40). From judgment thereon in favor of Appellees this appeal has been perfected. The initiation, course, and scope of the "October transaction" is best indicated by the following excerpts from the transcript of testimony:

> "(Testimony of Bankrupt, George F. Elliff)
>
> Q. (By Mr. Jacobs). Now after that conversation with Mr. Ramsey what did you do in reference to preparing a new agreement if you did anything?
>
> A. Well, I talked it over with them, with my wife. Then I went and talked to my mother-in-law and said that the only solution I could possibly think of myself was to——
>
> Q. Is this a conversation between you and your mother-in-law?
>
> A. This is a solution that I came up with with Mr. Ramsey.
>
> Q. Is that what you told Ramsey?
>
> A. That if she would sign a note for $28,000.00 that we could work out some arrangements where the inventory could be her security and the signing of the note as guarantor and I mean to continue.
>
> Then, I believe, if I am correct, I saw Mr. Ramsey or either he came to the warehouse again

the following week, I believe this took place over the week end.

On Monday I had a conversation and told him what I proposed to do or could do. He mentioned that he could not give me the final answer but he would discuss this with Mr. Hunter and that since time was of the essence in it he would give me an answer as soon as possible, which he did.

Q. Was this before or after the warehouse was locked up?

A. This was after the warehouse had been locked up.

Q. I see. Now then what happened next in reference to the negotiation of a new agreement?

A. There was several phone calls back and forth with Mr. Ramsey and myself. I believe Mr. Hunter called me directly and stated that he would consider this subject to submission of Mrs. Lannin's financial statement.

Q. Now you speak about an inventory being made security. Who suggested that arrangement?

A. To whom, sir? [105]

Q. Who suggested it to you? Did you originate the idea?

A. I originated that idea, yes." (T.R. pp. 171-172.)

. . . . .

". . . Mr. Shapro. Q. Mr. Elliff, who asked Mrs. Lannin to endorse and guarantee the payment of this $28,000.00 note to Twin City?

A. I believe I did.

Q. Prior to the date that the note was issued, to your knowledge, did any representative of Twin City Lumber Company meet Mrs. Lannin?

The Court. Prior to what?

Mr. Shapro. Prior to the date of the note.

A. I believe Mr. Ramsey met her, if I am not mistaken.

Q. Was any request made of Mrs. Lannin to sign this note or guarantee this note by anybody, to your knowledge, on behalf of or by Twin City Lumber Company?

A. Not to my knowledge." (T.R. pp. 351-353.)

". . . (Testimony of Pearl K. Lannin)

A. That is my signature.

Q. That is also your signature. Mrs. Lannin, how did you happen to execute this guarantee?

A. You mean the note?

Q. Yes. Who asked you to do it?

A. My son-in-law and daughter came over to the house and he said he brought the daughter along——

. . .

The Witness. They came over and he said that the reason he brought my daughter with him was that she was interested in it too, being his wife, and then he told me that he needed some money to keep going in the business.

At the time I didn't understand it was closed up by the lumber company.

Mr. Shapro. If your Honor please, what the lady understood is not what the question calls for.

The Court. Just say what was said, Mrs. Lannin, as well as you can, what you said, your son-in-law and daughter in the conversation.

The Witness. Anyhow he stated he wanted this amount [385] to make it as short as I can, and of course——

The Court. I am not asking you to make it short. Don't get that impression. I want you to say what was said, but just what was said, please.

> The Witness. Well, of course, I was stunned to be asked for this much money, but at the same time, as I understood, just by observing that he had this large building out there and a lot of material there, not having any idea it would come to this point, we would ever be at Court with it, I did it out of the good of my heart, thinking that perhaps that was his one big chance, and my thoughts were that if I didn't, I might always be blamed that I didn't give him his chance and I said—I didn't say at that time that I would do it, but then a little bit later he came back or telephoned—I can't remember just how that I finally said I would do it, I would go along with it. I thing that is the gist of everything." (T.R. pp. 421-423.)

At this time the bankrupt owed appellees some $28,000.00 to secure the payment of which they held in pledge valid warehouse receipts for lumber which cost $25,000.00 and was worth, for resale by the bankrupt, $30,000.00. By the terms of the October transaction (Trust Agreement, Pl. Ex. No. 7, T.R. p. 154), the bankrupt transferred to Mrs. Lannin his interest in all his stock in trade (both the warehoused lumber and the free lumber) and his accounts receivable. The proceeds of these were to be paid over by the bankrupt and held by his attorney in trust for the benefit of his mother-in-law, Appellant Pearl K. Lannin, and he agreed to a similar trust for all of his future stock in trade, whether or not purchased from Appellees and for all his accounts receivable. The accounts were in the amount of $25,000.00. Appellees were neither parties to nor direct beneficiaries of that Trust Agree-

ment. In fact, the sole named beneficiary thereof was Appellant Pearl K. Lannin. As a part of the same October transaction, but necessarily prior thereto (by reason of the recitals contained in the Trust Agreement), the bankrupt and wife had executed, in favor of Appellees, the promissory note for $28,000.00 (Defendants' Ex. B, T.R. p. 143) and Mrs. Lannin had endorsed and guaranteed the payment of that note to Appellees. *In consideration for such guarantee,* Appellees surrendered the warehouse receipts (which they had theretofore held as security for the bankrupt's admitted obligations equaling the amount of the promissory note) so that the warehouse company could and did reissue warehouse receipts covering the lumber then in the field warehouse in the name of, and delivered same to, Mrs. Lannin as security for her said guarantee to Appellees. Naturally, before Appellees surrendered their security in the form of the warehous receipts they made an investigation as to the financial responsibility of Mrs. Lannin. (Financial Statement, Defendants' Ex.J.)

It is true that no notice was given to the creditors of the bankrupt of the October transaction and/or of the Trust Agreement, nor of the release and/or the transfer of the warehouse receipts by Appellees to Mrs. Lannin, but, as a result thereof, the bankrupt's business was reopened and continued, although apparently unprofitably until shortly before the institution of these bankruptcy proceedings in July, 1954.

LEGAL ISSUES.

We accept the legal issues as tendered in Appellants' Opening Brief (p. 6) and resolve them as follows:

1. The October transaction was not procured for the purpose of or with the actual intent or effect of hindering, delaying or defrauding the bankrupt's creditors. (Finding of Fact No. 1, T.R. p. 58.)

2. Under the October transaction the bankrupt transferred no property to Appellees nor did he incur any new obligations to Appellees but merely gave the $28,000.00 promissory note to evidence his antecedent and admitted indebtedness in that amount to Appellees. (Finding of Fact No. 10, T.R. pp. 57-58.)

3. The property remaining in the hands of the bankrupt after the October transaction did not leave him an unreasonably small capital for his business. (Finding of Fact No. 5, T.R. pp. 54-55.)

4. The bankrupt was not insolvent at the time of the October transaction nor was he rendered insolvent thereby. (Finding of Fact No. 2, T.R. pp. 52-53.)[1]

5. The bankrupt received fair consideration (as defined by Sec. 67, Bankruptcy Act and California Code Sec. 3439) for the October transaction. (Findings of Fact Nos. 10 and 11, T.R. pp. 57-58.)

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[1]In computing the alleged "insolvency" of the bankrupt in October, 1953, appellants (Opening Brief, pp. 16-17) set up aggregate liabilities of $64,000.00, including $13,000.00 due Mrs. Lannin. The bankrupt's accountant's testimony and records indicated that indebtedness at only $7,000.00 (T.R. p. 221 and p. 270; Defendants' Ex. No. C for Identification), thus making a net worth of $1,500.00 instead of a deficit of $4,500.00. The records support the Court's finding above cited.

6. There was no fraud in the October transaction and there was adequate current consideration for the promissory note and hence same was and is valid and enforceable by Appellees against Appellant Pearl K. Lannin, the guarantor thereof. (Finding of Fact on Cross-Complaint, Nos. 2, 3 and 5, T.R. pp. 61-62.)

ARGUMENT.

Appellants seek to avoid as against the Trustee and the guarantor thereof and to cancel the $28,000.00 promissory note of the bankrupt guaranteed by Appellant Mrs. Lannin, the bankrupt's mother-in-law. They do so, per their Opening Brief, by asserting that the so-called October transaction (which resulted in, among other things, the execution, guarantee, and delivery of this note to Appellees) was fraudulent under the following provisions of Sec. 67d(1)(e), (2)(a), (b) and (d), Bankruptcy Act; 11 U.S.C.A. 107d(1)(e)(2)(a), (b) and (d):

I. THE APPLICABLE STATUTES.

"Sec. 67d(1). For the purpose of, and exclusively applicable to, this subdivision d: . . . (e) consideration given for the property or obligation of a debtor is 'fair' (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, *or* (2) *when such* property or *obligation is received in good faith to secure* a present advance or *antecedent debt* in an amount not disproportionately small as compared with the value of the property or obligation obtained. (Italics ours.)

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; . . . (d) as to then existing and future creditors, if made or incurred with *actual intent* as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors." (Italics ours.)

II. NOTE WAS ISSUED FOR "FAIR" CONSIDERATION.

To the extent that this note is challenged as being "without fair consideration," Appellants apparently ignore the italicized portion of Sec. 67d(1)(e)(2) of the Bankruptcy Act quoted above. Obviously there was here both a current consideration for and/or an antecedent debt represented or covered by this promissory note. The current consideration was the release of the warehouse receipts upon the lumber in the field warehouse admittedly worth at least $25,000.00. The then existing (antecedent) obligations of the bankrupt to

Appellees, totalled $28,116.63. They included the warehouse account, the three dishonored checks (two of which had been credited to the warehouse account and the other of which had been credited to the open account) plus interest on the warehouse account and $21.00 protest fees on the three dishonored checks. (T.R. p. 481.)

III. THE "OBLIGATION" IS UNJUSTLY ATTACKED.

The only case which we have been able to find in which an "obligation," as distinguished from a "transfer," has been attacked under Section 67d(2) is *Central Hanover Bank & Trust Co. v. United Traction Co.* (2d C.), 95 F. 2d 50 at 55, wherein the Court says:

> "The appellees urge that the principal note was issued in fraud of creditors, and is void under Section 273 of the New York Debtor and Creditor Law. The master reported that the Company was insolvent on December 31, 1928, and, although the finding is disputed by the appellant, we shall assume it to be correct. The argument is that renewal of a barred debt is the incurring of an obligation without a fair consideration, and forbidden by the statute if the debtor is insolvent. To so construe the statute is to ignore all history. It has never been deemed a fraudulent conveyance to pay an honest debt or to perform an obligation which the obligor was under a moral duty to perform, although the debt or obligation was legally unenforceable because of some statutory provision."

The only text comment on this phase of the statute, and which we believe to be a sound analysis is that:

> "A bankrupt can defraud his real creditors by giving an obligation to *one not a creditor,* and thus make it possible for him to share in the estate." (Italics ours.)
>
> *Remington on Bankruptcy,* 5th Ed., Vol. 4(a), Section 1649, Page 62.

The Bankruptcy Act does not define "obligation" but does define "transfer" which

> "shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or unconditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor."
>
> *Bankruptcy Act. Sec. 1(30), 11 U.S.C.A. 1(30).*

Here there was, by the October transaction, no "transfer" whatever to Appellees by the bankrupt. Actually, Twin City Lumber Co. transferred (through its release of its warehouse receipts) its security position *to Mrs. Lannin.* Admittedly Twin City was, at the time it received the note guaranteed by Mrs. Lannin, a legitimate creditor of the bankrupt to the full extent of the face of the note. Hence the note (obligation) is not vulnerable to this attack.

IV. NOTE WAS NOT ISSUED OR RECEIVED IN FRAUD.

To the extent that this note is challenged under Section 67d2(d) of the Bankruptcy Act, supra, the burden of proving actual intent to hinder, delay or defraud creditors is upon the trustee. See *Nicholson v. Scott,* 50 F. Supp. 209, at 212 and *Hertzler, Trustee v. Nizzley,* 144 Atl. 824, 14 Am. B. R. (N.S.), 725, at 730:

> "The words 'hinder, delay, or defraud' in section 276 of the Debtor and Creditor Law have no broader meaning than that put on the same expression in the familiar Statute of Elizabeth and do not embrace mere preferences. Section 276 was so construed by Mr. Justice Rosenman in *Doehler v. Real Estate Board,* 150 Mis. 733, 740-745, 270 N.Y.S. 385; and in *Watson v. Goldstein,* 174 Minn. 423, 219 N.W. 550, the same construction was placed on the equivalent words in the Minnesota enactment of the Uniform Conveyance Act."
>
> *Irving Trust Co. v. Kaminsky,* 19 F. Supp. 816, at 818.

Fraud is not to be presumed and something more is required than the mere weight or preponderance of evidence, and it must be established by clear, unequivocal and convincing evidence. *Nicholson v. Scott, supra; Lackawanna Pants Mfg. Co. v. Wiseman* (6th C.), 133 F. 2d 482.

For the sake of the argument only, taking, as did the trial court, all of the evidence in the case in the light contended for by Appellants we see *no evidence*

that the "obligation incurred by" the bankrupt (the $28,000.00 note) was incurred "with actual intent . . . to hinder, delay or defraud . . . creditors."

> "The only evidence tending to support the charge of actual fraud in the execution of the chattel mortgage for the purpose of hindering and delaying creditors is the evidence which tends to indicate that the purpose of the mortgage was to prevent the creditors of the corporation from seizing the property pending the formation of a Nevada corporation and the issuance of a part of the stock thereof in payment of the indebtedness due the appellant. It appears that the appellant was pressing the bankrupt for further security in the form of a chattel mortgage, *and as he was in a position to immediately enforce his claims against the bankrupt* corporation, there was no actual fraud to be inferred from the mere execution of the chattel mortgage. The trustee's allegation of fraud was based largely upon the contention that there was no indebtedness due from the bankrupt to the appellant, and the charge of fraud in that regard fell when it was clearly shown that there was such bona fide indebtedness." (Italics ours.)
>
> *Woodruff v. Laugharn* (9th C.), 50 F. 2d 532, at 533.

Assuming then that the bankrupt was insolvent at the time of the October transaction (whether or not Appellees were cognizant of such insolvency) such insolvency would not be sufficient evidence upon which the trial court could have predicated a finding or conclusion that the note was fraudulent, either as against

the Appellant Trustee or as against Appellant Pearl K. Lannin.

"The Supreme Court has pointed out that an intent to prefer and an intent to defraud 'are not of the same quality, either in conscience or in law, and one may exist without the other'; but in connection with the foregoing expression the Supreme Court also makes the following statement: 'There is no necessary connection between the intent to defraud and that to prefer, but inasmuch as one of the common incidents of a fraudulent conveyance is the purpose on the part of the grantor to apply the proceeds in such manner as to prefer his family or business connections, the existence of such intent to prefer is an important matter to be considered in determining whether there was also one to defraud.' Also, the Supreme Court has pointed out that the giving of a mortgage and its effect upon other creditors constitute an item of evidence to be considered in determining the question of fraud.

Since we conclude that there was substantial evidence to support the findings of the Referee, it is not necessary to consider whether the execution of a chattel mortgage under the circumstances constituted a fraudulent conveyance under the Wisconsin Bulk Sales Law. We hold that the District Court did not err in affirming the findings of the Referee in Bankruptcy and the order of the District Court is affirmed."

In re Peacock Food Markets, Inc. (7th C.), 108 Fed. 2d 453, at 456;

See also *Coder v. Arts,* 213 U.S. 223, 53 L.Ed. 772; and *Hertzler, Trustee v. Nissley, supra,* at p. 729.

In *English, et al. v. Brown, et al.* (3rd C.), 229 Fed. 34, which was a case in which a husband in failing circumstances was indebted to his wife, and also to complainants, who had brought suit on their debt. The wife knew of such suit, and that the husband was in failing circumstances, and both she and the husband knew that he could not discharge both debts, and that payment of the one debt meant loss to the other creditor of his or her debt. The husband paid his debt to his wife, by transferring to her corporate stock the value of which was inadequate to cover his debt to her. It was there held that, in view of the rule in New Jersey that an insolvent debtor may prefer one creditor, even though the preferred creditor is his wife, this transfer was not a fraud upon complainants, even though the husband intended to defraud them; the wife accepting the stock for the sole purpose of obtaining payment of her debt, and not for the purpose of aiding her husband to defraud complainants. The Court (at page 39) said:

> "The law recognizes the right of a debtor in failing circumstances to prefer a bona fide creditor by making to him a valid conveyance in consideration of his debt, and of the right of the creditors acting honestly and in good faith to accept the same as security for or in payment of the debt."

In distinguishing the case of *Sherman v. Luckhardt,* 67 Kan. 682; 74 P. 277, the court in *Irving Trust Co. v. Chase National Bank* (2d C.), 65 F. 2d 409, at 411, said:

> "But *Coder v. Arts,* supra, and lower federal decisions too numerous to cite, have said the

> opposite. If the rule of *Sherman v. Luckhardt* be sound, then every preference may be attacked as a fraudulent conveyance, and the Court or jury will be required to make a finding not only that the recipient had no reasonable cause to believe that a preference would result, but also that the debtor was actuated only by an intent to prefer the favored creditor unaccompanied by an intent to hinder or delay other creditors. To so hold seems to us to destroy Section 60(b)."

A fraudulent intention (even if it existed in this case, which we deny) on the part of the Bankrupt Elliff in connection with the issuance of this note to Twin City Lumber Co. is not sufficient to render fraudulent the note itself. Under the Uniform Fraudulent Conveyance Act which is, for the most part, the basis of the applicable provisions of Section 67(d) of the Bankruptcy Act, and of Sections 3439.01 to 3439.12 of the California Civil Code the Court, in *General Kontrolar Co. v. Allen* (6th Cir.), 124 F. 2d 123, at 126, said:

> "Under it (Uniform Fraudulent Conveyance Act), the majority of cases, where the transfer is for a valuable consideration, as distinguished from a voluntary, gratuitous transfer, hold that a fraudulent intent on the part of the debtor is not sufficient to invalidate the transaction *unless a corresponding intention or knowledge of the debtor's purpose on the part of the transferee is made to appear.*" (Italics ours.)

Here no fraudulent intent whatever can be imputed to Twin City Lumber Co. where it had a legitimate debt of $28,000.00 against Elliff, secured to the extent

of the (at least) $25,000.00 worth of lumber in the warehouse and unsecured for the balance and was entitled to close the warehouse and to demand payment or security satisfactory to it as a condition precedent to its release of the warehoused lumber. See *Woodruff v. Laugharn, supra,* at p. 533, wherein Judge Wilbur of the 9th Circuit Court of Appeals was the author of the quotation cited above.

Taking the uncontradicted testimony of the Bankrupt Elliff on the subject of the circumstances surrounding, and the purpose of, his asking Twin City Lumber Co. to accept the guaranteed note and of his asking his mother-in-law, Mrs. Lannin, to guarantee it for him, we see, at best,

> "an honest effort to avert a financial crash and to continue in business, thereby promoting the interest of all creditors 'making a mortgage to secure an advance with which the insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay or defraud creditors. *Dean v. Davis,* 242 U.S. 438, 444; 37 S. Ct. 130, 132; 61 L. Ed. 419. . ."
>
> *Blackburn v. Bechtel,* 80 Fed. 2d 505 at 508.

CONCLUSION.

From the foregoing argument it appears clear to Appellees that the findings of fact made by the trial court, which were in all respects based upon conflicting evidence of substantial nature[2] adequately dispose

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[2]An unbiased reading of the testimony of the witnesses J. N. Baum, George F. Elliff, H. Collins, John W. Hunter, W. W. Ramsay, and Pearl K. Lannin will clearly support this statement.

of all of Appellants' contentions herein because such findings are binding upon this court.

1. *First National Bank of Portland v. Dudley* (9th Cir.), 231 Fed. 2d 396;
2. *Lines v. Falstaff Brewing Co., et al.* (9th Cir.), 233 Fed. 2d 927, and the cases therein cited; and
3. Rule 52a of the Federal Rules of Civil Procedure (28 U.S.C.A. 52a).

A reading of the Complaint and Cross-Complaint in this case (which, incidentally, were filed on the same day) shows clearly that the theory of Appellants below was that the October transaction and the note were made by the bankrupt with actual intent to hinder, delay and defraud his creditors and that Appellees conspired with him in this alleged fraud. After the full opportunity given to Appellants by the trial judge to prove their case he concluded, and properly so, that there was no merit whatever in any of plaintiffs' alleged causes of action or in the Cross-Complaint, except for the recoverable preference involved in Count 3. This count covered only payments made by the bankrupt to Appellees on its *open account* (not on the secured warehouse account) for lumber delivered in November *after* the October transaction.

The very purpose of the October transaction as indicated in the testimony of the bankrupt himself and of Appellant Mrs. Lannin herself[3] was to give him an opportunity to continue in business. Both the bank-

[3]T.R. pp. 171-172, T.R. p. 353, T.R. p. 360, T.R. pp. 421-428.

rupt and Mrs. Lannin were optimistic concerning this possibility and the general creditors of the bankrupt were in no way harmed by the October transaction either under the Trust Agreement or by the issuance of the note guaranteed by Mrs. Lannin. Even though admittedly no notice was given to creditors of the transaction (and perhaps the bankrupt and the other parties decided not to give notice because of the possible adverse effect upon the continuation of the business thereof) the fact remains that if notice had been given and the creditors had attached (as was apparently feared by the bankrupt and his attorney) the position of Twin City Lumber Co. would have been unchanged by such attachment. Appellees were then secured by a valid pledge (and no attack has ever been made by Appellants upon the validity of the May agreement) and surrendered that position, in effect, to Mrs. Lannin, in exchange for her guarantee of the bankrupt's note. (T.R. p. 396.) Actually, the general creditors of the bankrupt were benefited by the October transaction, because the effect thereof was to give the bankrupt a much more flexible operation of his retail lumber business than was possible under the strict terms of the May agreement. The fact that the October transaction did not save the bankrupt's business was no fault either of Appellees or of any part of the October transaction itself.

No point is made in Appellants' Opening Brief concerning the 4th Count of the Complaint, although the judgment thereon in favor of Appellees has been appealed. Perhaps Appellants were unable to find any

authority to support that 4th Count. The limit of the statutory right of the trustee in bankruptcy to set aside a fraudulent transfer or obligation under Section 67d of the Bankruptcy Act is to be found in Subdivision (6) thereof, which merely makes such a transfer or obligation "null and void against the trustee." There is no provision in the Bankruptcy Act, nor under the corresponding provisions of the California Civil Code, supra, for the collection by the trustee from the transferee or obligee of any damages "actual" or "penal" as prayed for in the 4th Count of Plaintiffs' Complaint, since by this action the trustee is seeking to enforce as against Appellees a purely statutory right, though there is no basis in law for such relief as is prayed for in that Count.

The findings of fact made by the trial court on the issues drawn on the Complaint and Cross-Complaint are amply supported by the evidence and, in turn, its conclusions therefrom support the judgment which should, therefore, be affirmed.

Dated, San Francisco, California,
September 25, 1957.

Respectfully submitted,
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